

Fair Political Practices Commission
MEMORANDUM

To: Chairman Randolph, Commissioners Blair, Downey, Huguenin, and Remy

From: Steven Benito Russo, Senior Commission Counsel
Luisa Menchaca, General Counsel

Subject: Adoption of Proposed Amendments to Regulations 18751, 18329.5, and 18701:
Conflict of Interest Code Exemption

Date: November 14, 2005

Executive Summary

This project proposes amendments to three existing regulations in order to bring greater procedural and substantive clarity to the process by which the Fair Political Practices Commission may exempt certain agencies from the requirement that they adopt a conflict of interest code.

The proposed amendments would:

- (1) Establish a better defined process for how an agency is to be exempted from the requirement of Government Code section 87300 that it adopt a conflict of interest code;
- (2) Reconcile the exemption process with the FPPC's current procedures for dealing with new agencies through the code reviewing process;
- (3) Make the exemption process less forbidding so that agencies will be less resistant to utilizing it;
- (4) Rephrase the criteria for granting an exemption to make them easier to understand and apply;
- (5) Provide by regulation a clearer statement of which agencies need not adopt a conflict of interest code; and
- (6) Rectify procedural gaps in the exemption process.

At its October 2005 meeting, the Commission engaged in a pre-notice discussion of this project. In the course of that discussion, the Commission generally favored adoption of the proposed amendments as a means of resolving the various shortcomings that have been identified in the current exemption process. The Commission made several suggestions

concerning the proposed amendments and the then-proposed decision points for regulation 18751. Those suggestions have been incorporated into the amendments and decision points that are herein being proposed.

Staff supports adoption of the proposed amendments to regulations 18751, 18329.5, and 18701, and makes the following recommendations regarding the decision points:

- **Decision Point 1:** Two options are proposed in subdivision (c)(2) of regulation 18751, which currently sets forth as one of the criteria for granting an agency an exemption from having to adopt a conflict of interest code, that the agency will be inoperative or nonfunctioning within a short period of time. Option 1 proposes to maintain the current language of the regulation, that the agency “soon” will be inoperative or nonfunctioning. Option 2 proposes that the period of time in which the agency will be inoperative or nonfunctioning be specified as “within one year.”

Recommendation: Staff recommends adoption of Option 2.

- **Decision Point 2:** Two options are proposed in a newly renumbered subdivision (c)(4) of regulation 18751, which currently sets forth as another of the criteria for granting an exemption that the Executive Director determines, even though none of the other criteria for granting an exemption have been satisfied, that an exemption should nonetheless be granted. Option 1 proposes to eliminate this provision entirely. Option 2 proposes that the provision be modified to specify a standard which must be satisfied in order for the Executive Director to grant an exemption when the other criteria for an exemption have not been met. Under this option, the standard would be that the Executive Director determines good cause exists for granting an exemption due to extraordinary circumstances which indicate the burden on the agency of adopting a conflict of interest code is not warranted by the degree of likelihood that a conflict of interest may occur. The particular extraordinary circumstances that are the basis for granting the exemption must be stated by the Executive Director in writing.

Recommendation: Staff recommends adoption of Option 2.

Background

A. History of the Exemption Process.

Since the inception of the Political Reform Act (the “Act”),¹ section 87300 of the Act has required, quite simply, that “[e]very agency shall adopt and promulgate a Conflict of Interest

¹ The Political Reform Act is contained in Government Code sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices

Code. . .” While the scope of this mandate may not be obvious on a simple reading, it becomes obvious when one reads the broad definition of “agency” found elsewhere in the Act. “State agency” is defined in section 82049 as “every state office, department, division, bureau, board and commission, and the Legislature.” Similarly, “local government agency” is defined in section 82041 as “a county, city or district of any kind including school district, or any other local or regional political subdivision, or any department, division, bureau, office, board, commission or other agency of the foregoing.” Thus, the statute, without any regulatory interpretation, requires that every agency in the state, no matter how small, and no matter whether it makes any governmental decisions or not, must, without exception, adopt a conflict of interest code.

Not surprisingly, problems inherent to the sweeping nature of the section 87300 mandate quickly surfaced after the Act went into effect. One obvious problem was that the statute appeared to call for certain advisory agencies to adopt a conflict of interest code, even though no one in the agency would qualify to be listed as a designated employee in the code, because no one in the agency made or participated in making governmental decisions. Another perceived problem was that very small agencies, having little decisionmaking authority, and often having a very limited lifespan and budget, were nonetheless burdened with adopting a conflict of interest code, the same as much larger agencies, despite having such limited time and resources with which to work.

To address these problems, the Commission in 1976 adopted regulation 18751 to provide a means by which the Commission, as the code reviewing body for state and multi-county agencies, may grant to any of those agencies, meeting certain conditions, an exemption from having to adopt a conflict of interest code. The Commission’s authority to grant a state or multi-county agency an exemption from having to adopt a conflict of interest code may be deemed inherent to the Commission’s authority under section 82011, subdivision (a) to act as the code reviewing body for state and multi-county agencies. It may also be viewed as consistent with the Commission’s broad authority under section 83112 to “adopt rules and regulations to carry out the purposes and provisions” of the Act, in that instituting an exemption process gives effect to section 87300 while creating a method for preventing that section from producing absurd results. In particular, it enables the Commission to avoid requiring an agency to adopt a conflict of interest code when that code has no function because the agency wouldn’t have any designated employees to enumerate in the code. It also enables the Commission to avoid requiring an agency to initiate the process for adopting a code when the agency would likely cease to exist before the code could be drafted and ready for final approval. (See *Eckart v. Superior Court* (1999) 69 Cal.App.4th 262, 265-266 [statutes should be interpreted so as to harmonize the statutes internally and with related statutes, to make them workable and reasonable in accord with common sense and justice, and to avoid absurd results].)

Some changes have been made to the regulation over the years, but only two substantively significant ones. In 1986, text was added encouraging the code reviewing bodies for local governmental agencies to view regulation 18751 as a model and adopt similar exemption procedures for agencies within their reviewing authority. Then in 1992, the responsibility for granting exemptions was shifted from the Commission itself to the Executive Director, with the Commission retaining authority to reconsider any decision made by the Executive Director. Otherwise, the regulation and its procedures have remained largely unchanged.

B. Summary of the Exemption Process.

Under current regulation 18751, a state or multi-county agency may obtain an exemption from the Executive Director by submitting a written request. The request must be accompanied by a collection of informational materials about the agency that are described with particularity in the regulation. Within 90 days of receiving the request, the Executive Director must approve the request, deny the request, or return the request to the agency for additional information and resubmission within 60 days. The Executive Director shall approve the request if the agency would have no designated employees if it were to adopt a code, or the agency is, or soon will be, inoperative. In addition, the Executive Director may approve an exemption request if the agency may be deemed to have no designated employees, even though it actually has some, because: (1) the agency does not have regulatory, quasi-regulatory, permit, licensing, or planning authority or functions; (2) the agency will not acquire real property in the foreseeable future; and (3) the annual operating budget for the agency, excluding salaries, is less than \$70,000. The Executive Director may also consider an exemption “on a case by case basis.” Upon approving a request, the Executive Director shall issue an exemption letter to the requestor. Upon denying a request, the Executive Director shall issue a letter to the requestor denying the request and setting a deadline for the agency to submit a proposed conflict of interest code to the Commission. Any interested person may submit a request to the Chairman for reconsideration of the Executive Director’s decision to approve or deny an exemption request. For good cause the Chairman may grant a request for reconsideration, and schedule the matter for hearing before the Commission.

C. Summary of the Problems with the Current Exemption Process.

While the basic concept of the above-described exemption process may be good, a number of problems associated with the application of this process have revealed themselves over time. One of the biggest problems is that the exemption process has been widely bypassed by the regulated community in order to achieve the same result (some determination that an agency need not adopt a conflict of interest code) by some other means. One method of doing this has been by state and local agencies submitting an advice request asking whether the officials in the agency are subject to the conflict-of-interest disclosure and disqualification

provisions of the Act.² The question of whether an agency is required to adopt a conflict of interest code is thus phrased more indirectly as whether the officials of that agency need to be covered by a code, as regulation 18701 provides that a person is not a public official or a designated employee if he or she is a member of a state committee, board, or commission with no decisionmaking authority. Regulation 18701, subdivision (a)(1) provides:

“... A committee, board or commission possesses decisionmaking authority whenever:

(A) It may make a final governmental decision;

(B) It may compel a governmental decision; or it may prevent a governmental decision either by reason of an exclusive power to initiate the decision or by reason of a veto that may not be overridden; or

(C) It makes substantive recommendations that are, and over an extended period of time have been, regularly approved without significant amendment or modification by another public official or governmental agency.”

While formal written advice from the Commission will answer whether a person is a public official or a designated employee, it does not answer the broader question of whether a person’s “agency” must nonetheless adopt a conflict of interest code. If an advisory board employs staff and has a budget for expenditures, the agency may need to adopt a conflict of interest code, even though the members of the board lack decisionmaking authority.

Another method of bypassing the exemption process has been by state and multi-county agencies determining on their own, without consulting the Commission, that no conflict of interest code or code amendment is necessary for the agency. Still another method has been by state and multi-county agencies obtaining direction from Commission staff concerning whether those agencies should adopt a conflict of interest code or be included within some other agency’s code, in fulfillment of the Commission’s duty to serve as the code reviewing body for such agencies.³ Under section 87312, Commission staff is required, “upon request, [to] provide technical assistance to agencies in the preparation of Conflict of Interest Codes.” (See Reg. 18329.5, subd. (b).) However, such technical assistance does not constitute a grant of exemption from the Executive Director.

The primary motivation for using alternative means to obtain a determination as to whether an agency must adopt a conflict of interest code is that these methods tend to be more expeditious than obtaining formal approval from the Commission’s Executive Director as part of the exemption request process. The need of certain agencies to obtain an expeditious

² See *Robinson* Advice Letter, No. A-05-062; *Peck* Advice Letter, No. I-04-007; *Andriese* Advice Letter, No. A-03-016; *Rein* Advice Letter, No. A-02-124; *Weiss* Advice Letter, No. A-01-122; *Dostart* Advice Letter, No. A-00-022; *Williams* Advice Letter, No. A-99-020, *Williams* Advice Letter, No. A-98-162; *Singh* Advice Letter, No. A-97-371; *Gergen* Advice Letter, No. A-96-328.

³ Recent examples of agencies receiving such advice have been the Agricultural Worker Health and Housing Commission and the Taskforce on the Holocaust, Genocide, Human Rights and Tolerance.

determination as to whether or not they must adopt a conflict of interest code has become particularly critical since the enactment of section 87302.6. Under this section, members of boards or commissions of newly created agencies are required to file statements of economic interests fully disclosing their economic interests within 30 days of assuming office unless a determination is made, before that 30 days expires, that the agency is exempt from having to adopt a conflict of interest code, or the board or commission is found to lack decisionmaking authority as defined in regulation 18701, subdivision (a)(1). (Reg. 18754, subd. (a)(3)(B).) However, determinations by these alternative means entail fewer procedural safeguards than are afforded under the exemption process (such as the right of interested persons to request reconsideration of an exemption decision). Moreover, it is unclear whether these practices may insulate an agency or an individual from liability for violating the duties imposed by the Act.⁴

Another problem with the exemption process is that both the regulated community and agency staff have found the criteria for granting an exemption set forth in regulation 18751 are rather confusing in the manner in which they are stated, so that it is difficult to determine when certain criteria are satisfied. One source of confusion is that current subdivision (c)(1) declares a request for exemption *shall* be approved for an agency that would have no designated employees if it were to adopt a conflict of interest code, while subdivision (d) declares that a request for exemption *may* be approved for an agency that would have no designated employees because it meets certain seemingly unrelated requirements concerning the function, real property assets, and budget of the agency.

Dovetailing with the problem that the current exemption criteria in regulation 18751 are not stated clearly enough, is the problem that certain agencies having only an advisory function are not expressly stated to be eligible for an exemption. This necessarily adds to frustration with the exemption process, and avoidance of its procedures.

Finally, the exemption process described in regulation 18751 contains procedural gaps that can make application of the process problematic. One major problem in this regard is that once an exemption request is approved, there is no provision for it to end. So as happened in one case, an agency was granted an exemption, and even though the basis for the exemption ended, the agency continued to operate without a code, because there was no limitation on the duration of the exemption or a process for it to be reviewed.⁵ Other procedural gaps exist, such as what notice must be given that an exemption request has been granted or denied, so that interested persons will know to request reconsideration by the Commission if they object to the decision, and when such a request for reconsideration must be made.

⁴ There is no provision in the Act granting immunity from prosecution to agencies that fail to adopt a conflict of interest code without going through the exemption process, or individuals who fail to file a statement of economic interests without obtaining formal written advice as provided in section 83114. Further, there is no provision in the Act or the Commission's regulations granting immunity from prosecution to an agency that fails to adopt a conflict of interest code based on formal written advice given to an individual that he or she is not subject to the conflict-of-interest disclosure and disqualification provisions of the Act. As stated in regulation 18329, subdivision (b)(7), formal written advice only provides immunity to the person requesting the advice.

⁵ See *Paetzold* Advice Letter, No. I-01-027.

It is in light of these problems that staff proposes amendments to regulations 18751, 18329.5, and 18701 in order to improve the process by which agencies may be exempted from the requirement of adopting a conflict of interest code. The proposed amendments are described below with reference to the purpose that they are intended to serve.

Proposed Amendments

A. Establish a Better Defined Process For How an Agency Is To Be Exempted From the Requirement of Government Code Section 87300 That It Adopt a Conflict Of Interest Code.

In order to more firmly establish that obtaining an exemption under regulation 18751, rather than simply obtaining written advice from staff, is the exclusive means by which an agency may be absolved of the duty to adopt a conflict of interest code as required by section 87300, two amendments are proposed to regulation 18751, subdivision (b). First, language is proposed to be added specifying that a governmental body qualifying as an agency must adopt a conflict of interest code or be included within another agency's conflict of interest code unless granted an exemption as provided in regulation 18751. Second, additional language is added to the subdivision declaring that "[o]btaining an exemption as provided in this regulation is the exclusive means by which an agency may obtain an exemption from the requirement to adopt and promulgate a Conflict of Interest Code."

These proposed amendments to regulation 18751 are then reinforced by a new subdivision (c) that is proposed to be added to regulation 18329.5, which is the regulation that governs the issuance of written advice by the Commission. This proposed new subdivision would provide express guidance on what advice may be given concerning issues related to conflict of interest codes, and what advice may not be given so as not to undercut the exemption process. The subdivision would thus specify that the Commission may provide advice or assistance to a party for the purpose of determining whether that party is an agency as defined in Government Code sections 82041 and 82049, and therefore required to adopt a conflict of interest code pursuant to Government Code section 87300. The Commission may also provide advice or assistance to an agency concerning which positions should be designated in an agency's conflict of interest code through the application of regulation 18701. However, upon determining that a party qualifies as an agency, a request by that party to be relieved of the duty to adopt a conflict of interest code may only be processed pursuant to regulation 18751.

Finally, a new subdivision (l) is proposed to be added to regulation 18751 that distinguishes an exemption request from formal advice or informal assistance given to an individual pursuant to regulations 18329 and 18329.5, concerning his or her filing duties under an existing conflict of interest code.

B. Reconcile the Exemption Process with the FPPC's Current Procedures For Dealing with New Agencies through the Code Reviewing Process.

Under current practices, when Technical Assistance Division staff become aware that a new state or multi-county agency is coming into existence, staff, in keeping with the Commission's role as the code reviewing body for such agencies, will contact the agency to inquire whether the agency will need to adopt a conflict of interest code or be included within another agency's conflict of interest code.⁶ This contact may result in a letter being issued to the agency by staff, and approved by the Executive Director, advising that the agency need not adopt a conflict of interest code because its members do not have decisionmaking authority. While this is an expeditious method of resolving the issue of whether the agency must adopt a code, questions arise as to whether this practice fits within the current regulatory structure for granting an exemption.

Therefore, language is proposed to be added to regulation 18751, subdivision (d) that would expressly give the Executive Director the authority to grant or extend an exemption on his or her own initiative in the absence of a request from the agency. Thus, staff may continue to proactively contact new agencies to determine if those agencies need to adopt a conflict of interest code, but when the determination is made that the agency need not adopt a code, an exemption letter would be issued by the Executive Director declaring that the agency is exempt from adopting a code.

In keeping with this proposed amendment to regulation 18751, subdivision (d) discussed above, other conforming changes are then proposed throughout regulation 18751 (such as changing the word "approved" to "granted") so as to eliminate the implication that the Executive Director may only act in response to a request from an agency that an exemption be approved.

C. Make the Exemption Process Less Forbidding.

A significant source of the resistance to utilizing the current exemption process is that it is viewed by some as being too cumbersome. The part of the process that often seems most cumbersome is the current requirement that agencies requesting an exemption must amass a large number of supporting documents in support of the exemption. In order to alleviate this problem, amendments are proposed to subdivisions (e), (f), and (g) of regulation 18751 to try to tailor the materials that must be submitted with a request to the specific basis for the request under the four proposed criteria. Of particular note, a request based on an agency being a small board or commission without decisionmaking authority would only require submission of the entity's statutory authorization, identification of the person or body to whom the agency reports, and a copy of the agency's last report, if there is one, that it made to the agency to which it reports.

⁶ As the filing officer, Commission staff would be concerned about whether officials with the new agency are filing assuming office statements within the specified timelines (either 10 or 30 days from the date of assuming office).

Also intended to deal with the criticism that the exemption process is too cumbersome, a subdivision (m) is added to regulation 18751 to provide that a request to renew an exemption need only consist of a declaration that the circumstances supporting the original grant of an exemption have not changed.

Then to deal with the problem of the exemption process taking too long to be compatible with the 30-day filing requirement imposed on members of boards or commissions of newly created agencies under section 87302.6, a new subdivision (i) is inserted into regulation 18751 that would toll the running of this time limit while a request for exemption is pending, provided the request is submitted before the limit expires. A similar tolling provision is also included in this subdivision to toll the running of the time limit under section 87303 for the adoption of a conflict of interest code while a request for exemption is pending, provided the request is submitted before that limit expires. Staff believes there is authority for this proposal in order to harmonize the economic disclosure provisions of the Act with the provisions governing conflict of interest code adoption. (See *First Industrial Loan Co. v. Daugherty* (1945) 26 Cal.2d 545, 550 [an administrative agency may “fill up the details” of a statutory scheme by adopting regulations as needed to promote the purposes of the statutory scheme and carry that scheme into effect].)

D. Rephrase the Criteria For Granting an Exemption To Make Them Easier To Understand and Apply.

There are currently four criteria under regulation 18751, subdivision (c) for the granting of an exemption: (1) the agency has no designated employees; (2) the agency will soon terminate; (3) the agency may be deemed to have no designated employees because it meets certain requirements concerning the function, real property assets, and budget of the agency; or (4) the Executive Director decides on a case by case basis that an exemption should be granted. As discussed earlier in this memorandum, these criteria, as currently phrased, are generally viewed as confusing and are often difficult to apply. In an effort to address these concerns, this project proposes the following amendments to the current criteria:

- The first criterion in subdivision (c)(1), that the agency has no designated employees, would remain unchanged.
- The second criterion in subdivision (c)(2), that the agency will soon terminate, also remains unchanged except the Commission is presented with a decision point concerning whether to replace the word “soon” with a specific time limit. At this **DECISION POINT 1**, staff is recommending that the time limit be stated as “within one year,” as this will make the criterion clearer and easier to apply.
- The third criterion in subdivision (d) is proposed to be renumbered to put all the criteria together in subdivision (c), and rewritten to delete the cryptic language that would allow certain agencies having designated employees to be deemed not to have designated employees and therefore become eligible for an exemption. In place of this language would be language expressly exempting the small advisory bodies that the original

language was apparently trying to exempt. In addition, the current \$70,000 budget limit for an agency to be considered small enough to qualify for an exemption is increased to \$150,000. This is an adjustment of the \$70,000 limit to current dollars, based on the increase in the Consumer Price Index since the limit was instituted, with the amount rounded up to an even number, as requested by the Chairman during the pre-notice discussion of this project.

- The fourth criterion in subdivision (e) is also proposed to be renumbered to put all the criteria together in subdivision (c). More importantly, the Commission is presented with a decision point concerning whether to adopt **Option 1**, deleting this criterion entirely, or **Option 2**, which revises the criterion to state a standard that must be satisfied before the Executive Director may exercise his or her discretion to grant an exemption to an agency not satisfying any of the other three criteria. At this **DECISION POINT 2**, staff is recommending **Option 2**, that the catch-all criterion be retained, but with language added restricting its use, such that the Executive Director may only grant an exemption under this criterion if he or she finds that “good cause exists for granting an exemption due to extraordinary circumstances that indicate the burden on the agency of adopting a conflict of interest code is not warranted by the degree of likelihood that a conflict of interest may occur.” Under this option, an additional sentence is also proposed to be added to newly renumbered subdivision (j) of regulation 18751, requiring that when an exemption is granted under this catch-all provision, the Executive Director shall describe the particular extraordinary circumstances that warrant the granting of an exemption.

E. Provide By Regulation a Clearer Statement of Which Agencies Need Not Adopt a Conflict of Interest Code.

In keeping with the general consensus that the exemption process must be more straightforward and predictable if it is to be a viable means for determining which agencies must adopt, and which may be exempted from adopting a conflict of interest code, it is preferable if the easy calls may be dispensed with by simply referencing a regulatory provision that says agencies of a certain kind need not adopt a code. In fact, most instances in which there is a question about whether an agency needs to adopt a code involve agencies of a certain kind – committees, boards, and commissions, often having just a few members and little or no staff, whose only purpose is to research a particular topic and prepare a report or recommendation to the Governor, the Legislature, or some other decisionmaking authority, and then disband. Such bodies are essentially always exempted from adopting a conflict of interest code because they are found to be small agencies without decisionmaking authority, but reaching the conclusion that they lack decisionmaking authority may require significant analysis. For example, under

regulation 18701, determining whether an agency has a history of making decisions may involve complicated facts.

In an effort to dispense with these cases in a much more summary fashion, a new provision is proposed to be inserted at regulation 18701, subdivision (a)(1)(B), with other provisions renumbered accordingly, that says “[a] committee, board, or commission does not possess decisionmaking authority... if it is formed for the sole purpose of researching a topic and preparing a report or recommendation for submission to another governmental body that has final decisionmaking authority.” Thus, an exemption may be granted virtually automatically to such agencies under regulation 18751, provided they will not be acquiring real property and they do not exceed the budgetary ceiling.

F. Rectify Procedural Gaps in the Exemption Process.

To make the exemption process work more efficiently and effectively, it would be helpful to rectify certain obvious procedural gaps in that process that have long been rather troublesome. One gap is the absence of a simple requirement that all requests for exemption contain a statement of the specific basis on which the requestor contends an exemption should be granted. To rectify this, language is proposed to be added to regulation 18751, subdivision (d) requiring that anyone requesting an exemption on behalf of an agency must state a basis for the exemption.

Another gap is that while regulation 18751 provides for interested persons to be able to ask the Commission to reconsider the approval or denial of an exemption request by the Executive Director, there is currently no provision for giving them notice that a request has been approved or denied. To correct this, a provision is proposed to be added to regulation 18751, at renumbered subdivisions (j) and (k), that the Commission shall send a copy of the letter granting or denying an exemption to anyone requesting it and shall post the letter on its website.

Still another gap is that regulation 18751 does not set any timelines for when a request for reconsideration may be made. Therefore, a provision is proposed to be added to renumbered subdivisions (j) and (k) requiring that a reconsideration request must be made within 30 days after an exemption has been granted or denied.

Finally, there is currently no provision for an exemption to terminate, so it may now continue for years after the conditions that justified its being granted have changed. To address this, a new subdivision (m) is proposed to be added to regulation 18751 that would provide for an exemption to terminate when the basis for the grant of exemption no longer exists, and for it to automatically expire after two years. A corresponding provision is then added to renumbered subdivision (j) that requires the Executive Director to state the basis for the exemption so one may determine when the basis for the exemption no longer exists.

Conclusion

Staff recommends that the proposed amendments be adopted as noted above, in order to bring needed improvement to the Commission's conflict of interest code exemption procedures.

Attachments

Proposed Amendments to Regulation 18751
Proposed Amendments to Regulation 18329.5
Proposed Amendments to Regulation 18701